INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	1
Statutes and rule involved	2
Statement	5
Argument	7
Conclusion	10

CITATIONS

Cases:

Falter v. *United States*, 23 F. 2d 420, certiorari denied, 277 U.S. 590 — 10

Grunewald v. *United States*, 353 U.S. 391 — 10

McGuire v. *Warden, etc.*, 122 F. Supp. 699 — 9

Pinkerton v. *United States*, 328 U.S. 640 — 9

Sanford v. *King*, 136 F. 2d 106 — 9

Strand v. *Schmittroth*, 251 F. 2d 590, certiorari dismissed on motion of petitioner, 355 U.S. 886 — 8

United States v. *Farrell*, 87 F. 2d 957, certiorari denied, 302 U.S. 683 — 9

United States v. *Fenno*, 167 F. 2d 593, certiorari dismissed on stipulation of counsel, 335 U.S. 806 — 8

United States v. *Murphy*, 217 F. 2d 247 — 8

United States v. *Reina*, 242 F. 2d 302 — 10

United States v. *Tacoma*, 199 F. 2d 482 — 9

Statutes and Rule:

Act of September 1, 1954, Section 10, 68 Stat. 1142, 1145, amending 18 U.S.C. 3282 (18 U.S.C. (Supp. V) 3282) — 4

18 U.S.C.:

3282 — 3

3651 — 2

3653 — 2

4164 — 6

Rule 12(b)(2), Federal Rules of Criminal Procedure — 4, 9

515442 - 59 — 1

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. [illegible]

SAUL GELB, ALSO KNOWN AS SOL GORDIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals (Pet. 19–20; R. 36–37) and the district court (R. 30–34) are not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 17, 1959 (R. 38). The petition for a writ of certiorari was filed on June 30, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the fact that a person is on probation for one offense precludes his being sentenced to imprisonment for a separate offense committed before the prior conviction.

2. Whether the petitioner could raise on collateral attack the issue that his prosecution was barred by the statute of limitations, and, if so, whether the statute had run.

STATUTES AND RULE INVOLVED

The probation statute provides in pertinent part:

18 U.S.C. 3651.

> Upon entering a judgment of conviction of any offense not punishable by death or life imprisonment, any court having jurisdiction to try offenses against the United States, except in the District of Columbia, when satisfied that the ends of justice and the best interest of the public as well as the defendant will be served thereby, may suspend the imposition or execution of sentence and place the defendant on probation for such period and upon such terms and conditions as the court deems best.
>
> * * * * *
>
> The court may revoke or modify any condition of probation, or may change the period of probation.
>
> The period of probation, together with any extension thereof, shall not exceed five years.
>
> * * * * *

18 U.S.C. 3653.

> * * * * *
>
> At any time within the probation period, the probation officer may for cause arrest the probationer wherever found, without a warrant. At any time within the probation period, or within the maximum probation period permitted by section 3651 of this title, the court

for the district in which the probationer is being supervised or if he is no longer under supervision, the court for the district in which he was last under supervision, may issue a warrant for his arrest for violation of probation occurring during the probation period. Such warrant may be executed in any district by the probation officer or the United States marshal of the district in which the warrant was issued or of any district in which the probationer is found. If the probationer shall be arrested in any district other than that in which he was last supervised, he shall be returned to the district in which the warrant was issued, unless jurisdiction over him is transferred as above provided to the district in which he is found, and in that case he shall be detained pending further proceedings in such district.

As speedily as possible after arrest the probationer shall be taken before the court for the district having jurisdiction over him. Thereupon the court may revoke the probation and require him to serve the sentence imposed, or any lesser sentence, and, if imposition of sentence was suspended, may impose any sentence which might originally have been imposed.

18 U.S.C. 3282, prior to the amendment of September 1, 1954, provided:

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within three years next after such offense shall have been committed.

Section 10 of the Act of September 1, 1954, 68 Stat. 1142, 1145, amending 18 U.S.C. 3282 (18 U.S.C. (Supp. V) 3282), provides:

> (a) Section 3282 of title 18 of the United States Code is amended by striking out "three" and inserting in lieu thereof "five".
>
> (b) The amendment made by subsection (a) shall be effective with respect to offenses (1) committed on or after the date of enactment of this Act, or (2) committed prior to such date, if on such date prosecution therefor is not barred by provisions of law in effect prior to such date.

Rule 12(b)(2) of the Federal Rules of Criminal Procedure provides:

> *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

STATEMENT

The petitioner has pleaded guilty at different times to three separate indictments (Exs. A, B, and C).[1] This proceeding involves the validity of the sentence under the third indictment, which he is now serving. The pertinent facts are, as follows:

On May 5, 1954, the petitioner pleaded guilty to a five-count federal indictment charging substantive violations of the narcotics laws committed on March 4 and 5, 1954. On the same date, District Judge Sidney Sugarman sentenced him to imprisonment for five years on each count, to run concurrently, and a committed fine of $2,000 on count one. (Ex. A; R. 5–6, 21–22.)

The second indictment, returned on April 12, 1956, while the petitioner was serving the sentence on the first indictment, was in two counts charging him with unlawful transportation of stolen bonds in interstate commerce, in violation of 18 U.S.C. 2314. The petitioner pleaded not guilty to this indictment on April 23, 1956, but on May 18, 1956, he changed his plea to guilty. On the latter date, District Judge Ryan sentenced him to imprisonment for five years on each count, to run concurrently, but execution of the sentence was suspended and he was placed on probation for five years to begin upon his release from incarceration under the sentence he was then serving. (Ex. C; R. 7, 22.)

[1] The record consists of the petitioner's appendix filed in the court of appeals, supplemented by the proceedings in that court. The three exhibits referred to are not printed. Each consists of an indictment returned against the petitioner and part of the docket entries applicable to such indictment.

On November 14, 1957, having served the five-year sentence imposed on May 5, 1954, less good-time deductions, the petitioner was released from confinement (R. 7, 23). By operation of law, however, he was subject to parole under that sentence "until the expiration of the maximum term or terms for which he was sentenced less one hundred and eighty days" (18 U.S.C. 4164).

Meanwhile, the third indictment had been filed on October 23, 1957. It charged the petitioner and 45 others with conspiracy from January 1, 1950, through May 1, 1956, to violate the narcotics laws, to defraud the United States of its right to have the Customs Service administered free of corruption, and to bribe employees of the Customs Service. The indictment also alleged the commission of thirty overt acts in furtherance of the conspiracy. The petitioner was named as a participant in the second, sixth, seventh, eighth, ninth, tenth and eleventh overt acts, which covered the period from October 24, 1952, to March 5, 1954. The eleventh alleged the facts of certain of the substantive offenses charged in the first indictment. The petitioner pleaded not guilty to this indictment on October 28, 1957, but on January 30, 1958, he changed his plea to guilty. (Ex. B.) On April 24, 1958, following the trial of nineteen of his co-defendants and the convictions of eighteen of them on March 18, 1958, the petitioner was sentenced by District Judge Kaufman to imprisonment for five years and a committed fine of $10,000 (Ex. B; R. 9, 22, 31).

The present proceeding arose on January 28, 1959, when the petitioner filed a motion to vacate the third indictment and the sentence thereon. He claimed, *inter alia*, that upon his release from imprisonment under the sentence imposed on the first indictment, the sentence of probation which Judge Ryan had imposed on the second indictment immediately became operative, and that the third sentence imposed by Judge Kaufman is therefore invalid because it amounted to a revocation of probation without a hearing or proof that he had violated any of the conditions of probation. (R. 2–19.) After a hearing, District Judge Bryan denied the motion. He held that this contention, as well as others not now pertinent, and a further contention that the third indictment was barred by limitations,[*] were without merit (R. 30–34).

The court of appeals affirmed, *per curiam*, "on the opinion of District Judge Bryan" (R. 37).

ARGUMENT

1. There is no merit in the petitioner's contention that, because the sentence of probation which Judge Ryan had imposed was by its terms operative, Judge Kaufman had no authority to impose the imprisonment sentence the petitioner is now serving (Pet. 7–13). We do not quarrel with the petitioner's premise that he was on probation at the time this sentence was imposed. But, as the courts below held, the petitioner's probationary status in no way impinged upon the authority of Judge Kaufman to sentence him on

[*] This contention was not specifically urged in the motion. Apparently it was raised on the argument before Judge Bryan.

his plea of guilty to the third indictment. The petitioner cites no authority for the proposition that his status immunized him against imprisonment for an offense which he committed prior to the time he commenced service of his probation. On the contrary, the cases hold that a probationer may be sentenced to imprisonment in such circumstances. See *United States* v. *Fenno*, 167 F. 2d 593 (C.A. 2), certiorari dismissed on stipulation of counsel, 335 U.S. 806; *United States* v. *Murphy*, 217 F. 2d 247 (C.A. 7); *Strand* v. *Schmittroth*, 251 F. 2d 590 (C.A. 9), certiorari dismissed on motion of the petitioner, 355 U.S. 886.

By the same token, the petitioner's contention that Judge Kaufman's action in sentencing him amounted to a revocation of his probation without a hearing or showing of a violation of its terms must fall. There was no claim that the petitioner had violated probation during the short period between his conditional release from imprisonment under the first sentence and his commitment under the present sentence, and no proceeding looking toward revocation of probation, as required by the probation statute (*supra*, pp. 2–3), was instituted. Hence, the present sentence did not purport to and did not have the effect the petitioner asserts it has.

The petitioner's ancillary argument that the present sentence has the effect of tolling the probationary period, in derogation of the terms of the probation sentence, raises only a question as to the time of service of that sentence and does not affect the legality of his present incarceration. The courts below did

hold (R. 32, 37) that the probationary period is tolled, citing *United States* v. *Farrell*, 87 F. 2d 957, 962 (C.A. 8), certiorari denied, 302 U.S. 683; *McGuire* v. *Warden, etc.*, 122 F. Supp. 699 (W.D. Pa.); and *United States* v. *Tacoma*, 199 F. 2d 482 (C.A. 2). It is true, as the petitioner says (Pet. 11), that these cases each involved a new crime committed while the defendant was on probation. Here, on the other hand, the petitioner has not been charged with a violation of probation and there has thus been no occasion for a determination that the suspended sentence Judge Ryan imposed on the second indictment should be executed. Accordingly, it was unnecessary for Judge Kaufman to fix the order of service of the suspended sentence in relation to the imprisonment sentence he imposed. In any event, at best, from the petitioner's standpoint, the probation sentence may be running concurrently with the sentence he is now serving (cf. *Sanford* v. *King*, 136 F. 2d 106 (C. A. 5)). In either case, whether the petitioner is now serving his probation or must serve it after his release from imprisonment, he has no standing to attack the present sentence.

2. The petitioner's contention that the third indictment was barred by limitations (Pet. 13–15) is frivolous. In the first place, it was waived by his failure to raise it by a pre-trial motion under Rule 12(b)(2) of the Federal Rules of Criminal Procedure. Secondly, even on the petitioner's hypothesis that his participation ended with his arrest on March 5, 1954, and that this was sufficient to show an affirmative withdrawal on his part (cf. *Pinkerton* v. *United*

States, 328 U.S. 640) so as to start the running, as to him, of the then three-year statute of limitations, this does not help him. For just six months after his claimed withdrawal, *i.e.*, on September 1, 1954, the period of limitations was enlarged from three to five years (see pp. 3–4, *supra*) and Congress specifically provided that the enlarged period should apply to offenses not already barred by the prior three-year statute. Thus, the period of limitations applicable on the petitioner's hypothesis extended, not to March 1957, as he claims, but to March, 1959, and the indictment was returned before the latter date. The validity of this provision of the statute amending the old statute of limitations is not open to doubt. See *Grunewald* v. *United States,* 353 U.S. 391, 396, fn. 9; *United States* v. *Reina,* 242 F. 2d 302, 305 (C.A. 2); *Falter* v. *United States,* 23 F. 2d 420, 425 (C.A. 2), certiorari denied, 277 U.S. 590.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

October Term, 1959

No. 159

SAUL GELB, also known as SOL GORDIN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF

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